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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

PROFESSIONAL COLLECTION CONSULTANTS, Plaintiff and Respondent, v. MICHAEL LEIZEROVITZ, Defendant, Cross-complainant and Appellant; PACIFIC BELL DIRECTORY, Cross-defendant and Respondent.	B143023 (Los Angeles County Super. Ct. No. MC008693)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest G. Williams, Judge. Affirmed.

Law Offices of Norman L. Schafler and Norman L. Schafler for Defendant, Cross-complainant and Appellant.

Law Offices of Scott D. Wu and Scott D. Wu for Plaintiff and Respondent.

Glenn O. Davis for Cross-defendant and Respondent.

Defendant Michael Leizerovitz advertised his dentistry practice in telephone directories published by cross-defendant Pacific Bell Directory (Pacific Bell) for several years. Plaintiff Professional Collection Consultants (PCC) as Pacific Bell's assignee sued Leizerovitz to collect unpaid advertising fees, and Leizerovitz cross-complained against Pacific Bell and PCC. Leizerovitz appeals a judgment against him on both the complaint and cross-complaint.

Leizerovitz contends (1) PCC failed to authenticate a written assignment, so the document was inadmissible, there is no evidence of an assignment, and PCC has no standing to sue; (2) PCC failed to satisfy the business records exception to the hearsay rule (Evid. Code, § 1271) for a document purportedly showing the amount due, so the document was inadmissible and does not support the judgment; (3) Pacific Bell canceled his 1995 advertising, so PCC is not entitled to recover the price for that advertising; (4) Pacific Bell did not satisfy a condition precedent to his obligation to pay for the 1995 advertising because it did not send him final proofs before publication, so PCC is not entitled to recover the price for that advertising; (5) he did not personally sign the 1996 advertising contract and the person who signed it was not his agent, so PCC is not entitled to recover the price for that advertising; and (6) the court erred by entering judgment for Pacific Bell on the cross-complaint.

We conclude that he has not shown error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Advertisements*

Leizerovitz advertised his dentistry practice in Pacific Bell telephone directories. He personally signed the advertising contracts for several years through 1995, and his office manager, Rick Pamplin, signed the contract in 1996. Pacific Bell published the advertisements in each of those years and billed Leizerovitz. Leizerovitz was delinquent in paying the bills.

2. *Trial Court Proceedings*

PCC sued Leizerovitz in April 1997 alleging common counts for open book account and account stated. Leizerovitz cross-complained against Pacific Bell and PCC in June 1997 alleging counts for breach of contract, negligence, interference with prospective economic advantage, and "damage to credit rating." He alleged that the quality of the advertising, including the reproduction of his photographs, was poor and that Pacific Bell refused to print his advertisements in 1997 despite his offer to pay in advance.

The case proceeded to a nonjury trial in March 2000. The court issued a Memorandum of Intended Decision in May 2000 stating that Leizerovitz was bound by Pamplin's acts under the doctrine of ostensible authority, that Leizerovitz was liable to pay a reasonable amount for the benefits he received, that a photograph in one of the advertisements was of poor quality so the total amount due should be reduced by 25

percent, and that Leizerovitz should recover nothing on the cross-complaint.[1] The court did not issue a statement of decision, and apparently none was requested.

The judgment entered in June 2000 awarded PCC $80,120.79 plus interest on its complaint against Leizerovitz and awarded judgment for Pacific Bell and PCC on the cross-complaint.

CONTENTIONS

Leizerovitz contends (1) PCC failed to authenticate the written assignment, so the document was inadmissible, there is no evidence of an assignment, and PCC has no standing to sue; (2) PCC failed to satisfy the business records exception to the hearsay rule (Evid. Code, § 1271) for the statement purportedly showing the amount due, so the statement was inadmissible and does not support the judgment; (3) Pacific Bell canceled his 1995 advertising, so PCC is not entitled to recover the price for that advertising; (4) Pacific Bell did not satisfy a condition precedent to his obligation to pay for the 1995 advertising because it did not send him the final proofs before publication, so PCC is not entitled to recover the price for that advertising; (5) he did not personally sign the 1996 advertising contract and Pamplin was not his agent, so PCC is not entitled to recover the price for that advertising; and (6) the court erred by entering judgment for Pacific Bell on the cross-complaint.

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[1] A memorandum of intended decision is a written tentative decision (Cal. Rules of Court, rule 232(a)). (See *In re Marriage of Hafferkamp* (1998) 61 Cal.App.4th 789, 793.) Before an amendment effective in 1982, rule 232(a) of the California Rules of Court referred to a tentative decision as an "intended decision."

DISCUSSION

1. *Authentication of Writings*

A writing must be authenticated before the writing or secondary evidence of its content can be received in evidence. (Evid. Code, § 1401.) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) Whether there is sufficient evidence to support a finding of authenticity is a question for the trial court. (Evid. Code, § 403, subd. (a)(3).) If the trial court finds that there is sufficient evidence, the issue of authenticity becomes a question of fact for the trier of fact. (*McAllister v. George* (1977) 73 Cal.App.3d 258, 262.)

The Evidence Code provides various methods to authenticate a writing. (Evid. Code, §§ 1411-1421.) Those statutory methods are not exclusive. (Evid. Code, § 1410.) Circumstantial evidence may support a finding of authenticity. (*McAllister v. George*, *supra*, 73 Cal.App.3d at pp. 262-263; *Young v. Sorenson* (1975) 47 Cal.App.3d 911, 915; see Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 1410, p. 452.)

We must affirm the overruling of an objection as to the authenticity of a writing if there is substantial evidence to show that the writing is what the proponent of the writing claims it is. (Evid. Code, § 1400.) We review a factual finding that a writing is authentic under the same substantial evidence standard. (*McAllister v. George*, *supra*, 73

Cal.App.3d at pp. 262-263; *Interinsurance Exchange v. Velji* (1975) 44 Cal.App.3d 310, 318.)

Joseph Favre, Jr., testified that as Pacific Bell's manager of accounts collections, he assisted collection agencies to whom accounts were assigned for collection. He testified that Pacific Bell customarily assigned delinquent accounts to collection agencies such as PCC after exhausting its own attempts to collect and that the written assignment dated April 17, 1997, was such an assignment. He testified further that Pacific Bell maintained the written assignment in its records in the ordinary course of business. Although he did not testify that he personally executed the written assignment, observed its execution (Evid. Code, § 1413), or was familiar with the signature (Evid. Code, § 1416), his testimony is sufficient to support a finding that the written assignment is what it appears to be, that is, an assignment by Pacific Bell to PCC of the claims against Leizerovitz.

2. *Business Records Exception to the Hearsay Rule*

Hearsay evidence is evidence of a statement made out of court that is offered to prove the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless it satisfies an exception to the hearsay rule. (*Id.*, subd. (b).)

The business records exception to the hearsay rule provides that evidence of a written record of an act, condition, or event is not inadmissible hearsay when offered to prove the act, condition, or event if the writing was made in the regular course of business at or near the time of the act, condition, or event, the custodian or other qualified

witness testifies as to its identity and mode of preparation, and the sources of information, method, and time of preparation indicate its trustworthiness. (Evid. Code, § 1271.)

An objection to evidence must be timely and state the specific ground for objection, or the objection is waived. (Evid. Code, § 353, subd. (a); *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 584.)

Leizerovitz's counsel's stated objection to admission of the statement showing the amount due, Exhibit 2, was "Same objection, your Honor. Can we mark these for identification until I have an opportunity to cross-examine?" The objection apparently referred to his objection to the previous exhibit, the written assignment, where he stated, "Objection, your Honor. I'd like an opportunity to cross-examine first." The court initially marked both exhibits for identification and deferred ruling on the objections.

Leizerovitz's counsel proceeded to object to the next exhibit on the same ground, stating, "I have the same objection, your Honor. Perhaps we can just have the stipulation that all of the documents can be marked for identification to save us some time until I have had a chance to cross-examine Mr. Favre." The court stated that Leizerovitz's counsel had the right to cross-examine in any event and that the admission of evidence was not conditioned on completion of cross-examination. Leizerovitz's counsel then stated, "The issue I have, your Honor, is that the document wasn't signed in his presence." The court then overruled the objection as to each of the three exhibits and admitted them in evidence.

Since Leizerovitz did not assert a hearsay objection, he waived the objection and we need not determine whether PCC satisfied the business records exception to the

hearsay rule.[2] Leizerovitz has not shown that the court erred by admitting the document in evidence.

3. *The 1995 Advertising*

Leizerovitz cites testimony concerning a form letter from Pacific Bell to Leizerovitz in March 1995 requesting payment and stating that the 1995 advertising had been canceled due to nonpayment. He contends the evidence shows that the 1995 advertising was canceled so the court erred by awarding the price of that advertising. He does not discuss Favre's testimony that Leizerovitz later promised to pay the amount due and made a partial payment of the amount due for a previous year or the testimony and documentary evidence that Pacific Bell in fact published the 1995 advertising. Since he fails to discuss the material evidence on point that may support the judgment, he waives his claim of error. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881; *County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274.) In any event, this evidence supports the conclusion that Leizerovitz agreed to pay for the 1995 advertising, received the benefit of the advertising, and is liable for the purchase price.

Leizerovitz also contends the 1995 advertising contracts "had language in them" to the effect that he had no obligation to pay unless he approved the final proofs. The referenced language is "no pay without proofs" in his handwriting above his signature on the document. An acceptance of an offer ordinarily must be absolute and unqualified to

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[2] Both Leizerovitz and PCC appear to equate the business records exception to the hearsay rule with authentication, to some extent. They are not the same. A writing may be authenticated based on statutory grounds or circumstances other than those required to satisfy the business records exception to the hearsay rule, as discussed *ante*.

form a contract, and a qualified acceptance is regarded as a new proposal. (Civ. Code, § 1585.) We need not decide whether an express contract was formed with respect to the 1995 advertising or determine the terms of the contract, however, because the judgment is based on common counts including an account stated. An account stated supersedes the original contract and creates a new obligation. (*Jones v. Wilton* (1938) 10 Cal.2d 493, 498; *Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 604.) Regardless of the validity or terms of the original contract, Leizerovitz has not shown an error in the judgment.

4. *The 1996 Advertising*

Both Leizerovitz and PCC address the issue of Leizerovitz's liability to pay for the 1996 advertising in terms of whether Pamplin had ostensible authority to enter into the 1996 advertising contract. The trial court also expressed its tentative decision in those terms, although a tentative decision is not binding and cannot be used to impeach the judgment. (Cal. Rules of Court, rule 232(a); *Tyler v. Children's Home Society* (1994) 29 Cal.App.4th 511, 552 .) Absent a statement of decision, we must infer all factual findings necessary to support the judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134; *Gibbs v. American Savings & Loan Assn.* (1990) 217 Cal.App.3d 1372, 1375.) We therefore must assume that the court found that Pacific Bell maintained an open book account of Leizerovitz's debits and credits (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708; *Warda v. Schmidt* (1956) 146 Cal.App.2d 234, 237) and that there was an account stated that Leizerovitz expressly or impliedly agreed to pay (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745,

752-753; *Zinn v. Fred R. Bright Co., supra,* 271 Cal.App.2d at p. 600). Leizerovitz has not shown an absence of substantial evidence to support those findings and does not explain how the ostensible authority issue relates to the common counts on which this matter was tried. In any event, assuming for purposes of argument that PCC must establish Pamplin's ostensible authority to support the judgment, we conclude that it has done so.

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) A principal is bound by the agent's acts within the agent's ostensible authority as to a person who relied on the acts in good faith and exercised ordinary care. (Civ. Code, § 2334.) For the principal to be bound, the person dealing with the agent must reasonably believe that the agent has authority and must exercise ordinary care in so believing, and the belief must be caused by the principal's "act or neglect." (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399.)

The principal's "act or neglect" (*Associated Creditors' Agency v. Davis*, *supra*, 13 Cal.3d at p. 399) or "want of ordinary care" (Civ. Code, § 2317) may consist of either affirmative conduct by the principal or inaction where the principal knows that the agent holds himself out as having authority. (*Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal.2d 638, 644-645; *Leavens v. Pinkham & McKevitt* (1912) 164 Cal. 242, 247-248; *Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761; *Stephan v. Maloof* (1969) 274 Cal.App.2d 843, 850.)

Whether an agent has ostensible authority is a question of fact. (*Tomerlin v. Canadian Indemnity Co., supra*, 61 Cal.2d at p. 643.) We must affirm the judgment if substantial evidence supports the judgment. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.)

Ann Quinn testified that Pamplin identified himself as general manager of Leizerovitz's dental office and provided a business card so stating, that she contacted Pamplin by telephone at Leizerovitz's office and met with Pamplin at that office on several occasions, and that in those meetings she and Pamplin discussed Leizerovitz's 1996 advertising and Pamplin signed the contract for the advertising purportedly on Leizerovitz's behalf. The trier of fact reasonably could conclude based on this circumstantial evidence that (1) Leizerovitz knew that Pamplin was meeting with Pacific Bell to discuss the 1996 advertising and that Pacific Bell believed that Pamplin had authority to enter into the contract on Leizerovitz's behalf, and (2) Pacific Bell's belief in Pamplin's ostensible authority was reasonable. It is undisputed that Leizerovitz did nothing to dispel that reasonable belief. The evidence therefore supports the conclusion that Pamplin had ostensible authority to enter into the 1996 advertising contract.

5. *Judgment on the Cross-Complaint*

Leizerovitz testified concerning his damages on the cross-complaint near the end of trial, and Pacific Bell objected to the testimony as irrelevant. The court sustained the objection, stated that there probably was no liability on the cross-complaint as a matter of law, and requested briefs to address the issues raised by the cross-complaint. The court stated that it was "bifurcating" the trial and would hear further testimony on the cross-

complaint only if it determined that the cross-complaint was legally viable. After the parties submitted briefs on the legal merits of the cross-complaint in April 2000, the court issued its tentative decision in May 2000 stating that Leizerovitz should recover nothing on the cross-complaint and entered judgment accordingly in June 2000.

Leizerovitz contends the trial court granted a motion to dismiss the cross-complaint or a demurrer at the time of trial. He contends the court erred in so doing, although his perfunctory argument does not explain the legal basis for his contention, cites no legal authority, does not cite the record, and does not discuss the merits of the trial court's ruling that his cross-complaint has no merit. We conclude that he has waived any error and need not consider the issue further. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

DISPOSITION

The judgment is affirmed. PCC and Pacific Bell shall recover their costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P.J.

CROSKEY, J.